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MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz. R. Supreme Court 111(c); ARCAP 28(c); Ariz. R. Crim. P. 31.24

FILED BY CLERK

NOV 21 2011

COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

| | | |
|--------------------------------|---|----------------------------|
| AMANDA H., |) | 2 CA-JV 2011-0075 |
| |) | DEPARTMENT B |
| Appellant, |) | |
| |) | <u>MEMORANDUM DECISION</u> |
| v. |) | Not for Publication |
| |) | Rule 28, Rules of Civil |
| ARIZONA DEPARTMENT OF ECONOMIC |) | Appellate Procedure |
| SECURITY, ABREE H., LEONIA H., |) | |
| and DONALD H. JR., |) | |
| |) | |
| Appellees. |) | |
| _____ |) | |

APPEAL FROM THE SUPERIOR COURT OF GILA COUNTY

Cause No. MD20090060

Honorable Gary V. Scales, Judge Pro Tempore

AFFIRMED

Robert D. Rosanelli

Phoenix
Attorney for Appellant

Thomas C. Horne, Arizona Attorney General
By Michelle R. Nimmo

Tucson
Attorneys for Appellee Arizona
Department of Economic Security

K E L L Y, Judge.

¶1 Appellant Amanda H. appeals the juvenile court’s June 2011 order terminating her parental rights to her daughters, Abree H., born in 2004, and Leonia H., born in 2006, and her son Donald H., born in 2007. Amanda does not dispute that, by the time of the termination hearing, her children had been in court-ordered, out-of-home placements for more than fifteen months. On appeal, she argues the evidence was insufficient to support the court’s determinations that she had substantially neglected or willfully refused to remedy the circumstances causing the children to remain in those placements, *see* A.R.S. § 8-533(B)(8)(a), or, alternatively, that she had failed to remedy those circumstances and there was a substantial likelihood she would remain unable to parent effectively in the near future, *see* § 8-533(B)(8)(c).

¶2 To terminate parental rights, a juvenile court must find the existence of at least one of the statutory grounds for termination enumerated in § 8-533(B) and “shall also consider the best interests of the child.” *Id.* Although statutory grounds for termination must be proven by clear and convincing evidence, only a preponderance of the evidence is required to establish that termination will serve a child’s best interests. *See* A.R.S. §§ 8-533(B), 8-537(B); *Kent K. v. Bobby M.*, 210 Ariz. 279, ¶ 41, 110 P.3d 1013, 1022 (2005). We will affirm an order terminating parental rights unless we can say as a matter of law that no reasonable person could find the essential elements proven by the applicable evidentiary standard. *Denise R. v. Ariz. Dep’t of Econ. Sec.*, 221 Ariz. 92, ¶¶ 9-10, 210 P.3d 1263, 1265-66 (App. 2009). We view the evidence in the light most favorable to upholding the court’s order. *Id.* ¶ 10.

¶3 As a result of previous dependency proceedings, Abree, Leonia, and Donald were placed in the custody of their maternal grandmother, Carla B., who was

appointed their permanent guardian. In October 2009, the Arizona Department of Economic Security (ADES) took the children into temporary custody after it learned Carla had been hospitalized for an overdose of prescription medication and it found the children excessively dirty, bruised, and scarred. In its dependency petition, ADES alleged Carla's overdose had been intentional and she had exposed the children to inappropriate caregivers, including Amanda, whose illegal drug use was known to her. ADES also alleged Amanda had a history of methamphetamine abuse that impaired her ability to parent and, according to family members, she continued to abuse methamphetamine. Neither Amanda nor Carla contested these allegations, and the juvenile court adjudicated the children dependent in January 2010.

¶4 Amanda tested positive for methamphetamine use in April 2010; thereafter, her compliance with random urinalysis protocols was sporadic at best. Although ADES had arranged for her to receive substance-abuse treatment and domestic-violence services, she had been "closed out" of those programs because of her lack of participation. She never even began the parenting classes ADES had offered her. In a report prepared for a September 2010 permanency hearing, the CPS case manager informed the juvenile court that Amanda continued to be noncompliant with random urinalysis testing; had failed to complete substance-abuse treatment, domestic-violence services, or parenting classes; and required assistance in "engaging" the children during visitation. The court changed the case plan goal to severance and adoption and directed ADES to file a motion to terminate Amanda's rights.

¶5 Citing § 8-533(B)(8)(a), ADES alleged termination was warranted on the ground the children had been in court-ordered, out-of-home placement for a cumulative

total of nine months or longer and Amanda had “substantially neglected or willfully refused to remedy the circumstances that cause[d] the children to be in an out-of-home placement.” Without reference to § 8-533(B), ADES further alleged,

[Amanda] has a substance abuse history involving methamphetamine which impairs her ability to parent. [Amanda]’s youngest child, [Donald Jr.], tested positive for methamphetamine at the time of his birth in July of 2007. As a result of [Amanda]’s neglect and substance abuse at that time, the children were found dependent as to [Amanda] in Gila County Superior Court MD2007-047. [Amanda] failed to comply with reunification services including substance abuse testing and treatment which resulted in the establishment of a Title 8 Guardianship regarding the children. Since that time [Amanda] has continued to abuse drugs, including methamphetamine. [Amanda] has failed to comply with her substance abuse testing and treatment offered pursuant to the present case. She has been closed out twice by her treatment provider . . . due to lack of participation.

¶6 In February 2007, Amanda failed to appear for a pretrial conference. The juvenile court found she had been properly served with notice of the conference, deemed her failure to appear as a waiver of her legal rights and an admission of the allegations in the motion for termination, and proceeded with the termination adjudication, in accordance with Rule 65(C)(6)(c), Ariz. R. P. Juv. Ct. The court also allowed ADES to amend its termination motion to allege, as an additional ground, that the children had been in court-ordered, out-of-home care for fifteen months or longer. *See* § 8-533(B)(8)(c) (termination warranted when (1) child in court-ordered, out-of-home placement for fifteen months or longer; (2) parent failed to remedy circumstances causing

such placement; and (3) there exists substantial likelihood she will be unable to parent effectively in near future).

¶7 In addition to the record, testimony, and exhibits previously admitted,¹ ADES presented the testimony of the ongoing CPS case manager in support of its motion. After the close of testimony, the juvenile court ordered that Amanda’s parental rights be terminated and directed ADES to submit proposed findings of fact and conclusions of law. The court stated ADES had proven the following grounds for termination: “Substance abuse on the part of [Amanda] . . . and also all three children being in an out-of-home placement for a cumulative total period of nine months and 15 months.”² The termination order from which Amanda appeals mirrors the allegations found in ADES’s motion, with the addition of the fifteen-month, time-in-care ground found in § 8-533(B)(8)(c), and reflects termination of her parental rights “pursuant to A.R.S. §[] 8-533(B)(8)(a) [and] 8-533(B)(8)(c).”

¶8 On appeal, Amanda maintains the evidence was insufficient to support a finding that she substantially neglected or willfully refused to remedy the circumstances that caused the children to be in out-of-home placement, as required for termination pursuant to § 8-533(B)(8)(a). Quoting *In re Maricopa Cnty. Juv. Action No. JS-501568*, 177 Ariz. 571, 576, 869 P.2d 1224, 1229 (App. 1994), Amanda notes that “parents who make appreciable, good faith efforts to comply with remedial programs outlined by

¹The termination hearing had commenced in December 2010. In January 2011, ADES reported it anticipated a “non-trial resolution” of its termination motion with respect to Amanda, and the juvenile court vacated her continued termination hearing date and scheduled a pretrial conference in its place.

²Amanda has not challenged the juvenile court’s additional finding that termination is in the children’s best interests.

ADES will not be found to have substantially neglected to remedy the circumstances that caused the out-of-home placement, even if they cannot completely overcome their difficulties.” She argues her participation in visitation and other services evinces “her commitment to maintaining a parental relationship with the children.”

¶9 In arguing the juvenile court also erred in terminating her parental rights pursuant to § 8-533(B)(8)(c), she acknowledges the proper inquiry is whether a parent has been unable to remedy “those circumstances existing at the time of the severance’ that prevent a parent from being able to appropriately provide for his or her children.” *Marina P. v. Ariz. Dep’t of Econ. Sec.*, 214 Ariz. 326, ¶ 22, 152 P.3d 1209, 1213 (App. 2007), quoting *In re Maricopa Cnty. Juv. Action No. JS-8441*, 175 Ariz. 463, 468, 857 P.2d 1317, 1322 (App. 1993), abrogated on other grounds by *Kent K.*, 210 Ariz. 279, ¶¶ 12, 22, 110 P.3d at 1016, 1018. But she maintains, nonetheless, that the children’s October 2009 removal from their guardian’s custody was caused by concerns about their guardian’s mental health and substance abuse, not her own, and the court therefore erred in concluding she was responsible for circumstances requiring their out-of-home placement.

¶10 ADES responds, in the first instance, that we should affirm the juvenile court’s order because Amanda has failed to challenge the termination based on the alternative ground of her substance abuse and so has waived that issue on appeal. *See, e.g., Michael J. v. Ariz. Dep’t of Econ. Sec.*, 196 Ariz. 246, ¶¶ 13, 27, 995 P.2d 682, 685, 687 (2000) (court will not address finding not challenged on appeal; affirming termination on single ground obviates consideration of alternative grounds). We decline to do so here, where neither the motion for termination nor the termination order

expressly refers to § 8-533(B)(3) or all of the elements that must be proven to support termination under that provision.³

¶11 But we agree with ADES that Amanda’s claims of insufficient evidence are unavailing. With respect to the juvenile court’s finding that termination was warranted pursuant to § 8-533(B)(8)(a), evidence established that Amanda neglected or refused to participate in nearly every reunification service ADES had offered.⁴ See § 8-533(D) (“In considering the grounds for termination prescribed in subsection B, paragraph 8 . . . of this section, the court shall consider the availability of reunification services to the parent and the participation of the parent in these services.”).

¶12 With respect to Amanda’s assertions in challenging termination pursuant to § 8-533(B)(8)(c)—that she was not responsible for circumstances causing the children’s original removal—she appears to have misunderstood the law, which requires the court to consider “those circumstances existing at the time of the severance rather than at the time of the initial dependency petition.” *Maricopa Cnty. No. JS-8441*, 175 Ariz. at 468, 857

³In relevant part, § 8-533(B) provides:

Evidence sufficient to justify the termination of the parent-child relationship shall include

3. That the parent is unable to discharge parental responsibilities because of . . . a history of chronic abuse of dangerous drugs, controlled substances or alcohol and there are reasonable grounds to believe that the condition will continue for a prolonged indeterminate period.

⁴In support of her argument, Amanda asserts she “did participate in a psychological evaluation and she attended supervised visits with the children.” According to the evidence, however, she attended visitation only “about 75 percent of the time” and even then was unable to parent the children without supervision and assistance.

P.2d at 1322. Just as critical, she has misstated the record. From the time the dependency petition was filed through the termination hearing itself, one of the causes alleged to require the children's out-of-home placement was Amanda's longstanding history of methamphetamine abuse and her apparent refusal to address that issue.

¶13 Ample evidence supports the juvenile court's termination of parental rights pursuant to § 8-533(B)(8)(a) and (c). Accordingly, we affirm the court's order terminating Amanda's rights to Abree, Leonia, and Donald.

/s/ Virginia C. Kelly

VIRGINIA C. KELLY, Judge

CONCURRING:

/s/ Garye L. Vásquez

GARYE L. VÁSQUEZ, Presiding Judge

/s/ Philip G. Espinosa

PHILIP G. ESPINOSA, Judge